Supreme Court of the United States

OCTOBER TERM, 1943

No. 537

KERSH LAKE DRAINAGE DISTRICT ..... *Petitioner*

v.

STATE BANK & TRUST COMPANY
OF WELLSTON, MISSOURI ..... *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT

In their Summary Statement counsel give the history of this litigation down to the rendition of the decree by the District Court in December, 1936, granting equitable relief as provided for in Act 46 of 1933, and the affirmance of that decree in 1937 by the Circuit Court of Appeals. See *Kersh Lake Drainage District* v. *State Bank & Trust Company*, 92 F. (2d) 783. Their narrative skips an interval of

six years and then takes up with the filing of the Motion to Wind Up Receivership (R. 11). During that interval much happened which throws light on the merits of the Petition for Certiorari.

After affirmance by the Circuit Court of Appeals the Commissioners in the name of the District filed a foreclosure suit. It is still pending. Their property was delinquent, and they and other landowners were made defendants. Thus we have the odd situation of the three commissioners, Holthoff, Warren and Free, suing themselves as delinquent landowners. They own more lands than any other persons in the District, and the amounts at stake for them are substantial (R. 28). In the foreclosure suit the Commissioners, as defendants, and other landowners pleaded in bar of the District's right to collect taxes a decree rendered by the Lincoln Chancery Court in 1932, hereinafter referred to as the "Fish decree". It exempted two-thirds of the lands of the District from further taxation. It was a prearranged decree. The Commissioners who were supposed to defend the suit were the principal beneficiaries of the decree. The trial court overruled the plea of *res adjudicata* and entered a decree of foreclosure. The landowners appealed. By a four to three decision of the Supreme Court of Arkansas they obtained a reversal. See *Johnson* v. *Kersh Lake Drainage District*, 198 Ark. 743, 131 S. W. (2d) 620. At that point the attorneys for the creditors thought it advisable to have the district apply to this Court for a writ of certiorari. The Commissioners, with a favorable decision from the Supreme Court of Arkansas, were opposed to any further judicial proceedings which might disturb their advantage. They refused to allow the District to apply to this Court for the writ. The creditors put the matter before the District

Court. The Commissioners, with District funds, employed a special attorney to resist the application (R. 29). The District Court directed the Commissioners to proceed and appointed G. B. Rose to present the petition (R. 29). The writ was issued, but on the merits this Court affirmed. See *Kersh Lake Drainage District* v. *Johnson*, 309 U. S. 485.

The Supreme Court of Arkansas, in its opinion, pointed out that the only way in which the Fish decree could be eliminated as a defense in the foreclosure suit was by direct attack for fraud under a special statutory proceeding. The creditors asked the Commissioners to make such an attack and to file supplemental pleadings in the foreclosure suit. Still intent on preserving for themselves the fruits of the Fish decree, the Commissioners declined. Again the creditors went to the District Court. It directed the Commissioners to file the supplemental pleadings, but declined to require them to attack the Fish decree for fraud. In the Order, however, the right of the creditors to make an independent attack was recognized (R. 45).

The foreclosure suit came on for trial the second time and the supplemental pleadings filed by the District were dismissed. In the meantime the creditors had filed the suit attacking the Fish decree for fraud, and the complaint in that suit was also dismissed. Appeals were perfected in both suits. In the Supreme Court of Arkansas the cases were argued together. That Court found that there was fraud in the rendition of the Fish decree and reversed the decree of the trial court. Having thus vacated the decree which had supplied the basis for the plea of *res adjudicata*, it reversed the decree in the foreclosure suit and ordered all the lands including those of the Commissioners to be charged with taxes. See *Kersh Lake*

Drainage District v. *Johnson*, 203 Ark. 315, 157 S. W. (2d) 39. The Commissioners, as defendant landowners, without any urging, then applied to this Court for a writ of certiorari claiming that the Supreme Court of Arkansas had deprived them of constitutional rights by reversing the decree in the foreclosure suit. The application was denied. See *Johnson* v. *Kersh Lake Drainage District*, 316 U. S. 673.

After the remand of both suits to the trial court supplemental pleadings were filed. In those filed in behalf of the delinquent landowners there is a suggestion that the attorneys who had been appointed by the District Court to participate with the regularly employed attorney of the District in the foreclosure suit were going beyond the authority conferred upon them. No effort was made to go to the Federal Court and ask that the authority of the attorneys be clarified. The two cases were submitted to the chancellor on briefs in October of 1942. A little later, but six years after the entry of the decree in this suit, the attorneys who represented the Commissioners and others as defendants in the foreclosure suit conceived the idea that it would be advantageous to them to dispense with supervision by the District Court. By doing that they could eliminate the two attorneys appointed by the District Court to associate with the District's regularly employed attorney and thereby dictate the course which should be followed by the District in its suit against them as defendants. They had visions of another Fish decree. These attorneys for the landowners then asked three of their clients, the Commissioners, to adopt a resolution in behalf of the District authorizing them to file the Motion to Wind Up Receivership. The Commissioners did not even consult the regularly appointed attorney for the District. (Stipulation, Paragraph XX, R. 34.)

These Commissioners evidently did not think the supervision being accorded by the District Court was that of an ordinary receivership for without applying for permission, or making known their plans, they authorized their individual attorneys to make a strategic move in the name of the District, and they incurred expenses which were charged to the District in filing the motion and in appealing to the Circuit Court of Appeals, when the only object was to obtain for themselves a personal benefit.

The order of the District Court which is most irritating is that of July 10, 1940. Counsel quote only that portion of the order which serves their argument. To them a comma is a period. At page 41 of their brief they say:

> "The order of the district court in this case of July 10, 1940, made on the petition of the State Bank & Trust Company, provides:
>
> " 'It is further ordered that the said foreclosure proceedings shall be conducted by A. H. Rowell and A. F. House as attorneys for the creditors of the district' (R. 45).
>
> "The conduct of the suit was taken over by the attorneys for the judgment creditors."

The order reads as follows:

> "It is further ordered that the said foreclosure proceedings shall be conducted by A. H. Rowell and A. F. House as attorneys for the creditors of the district, and in conjunction with Robert A. Zebold as attorney for Kersh Lake Drainage District" (R. 30, 45).

ARGUMENT

The District Court Did Not Undertake to Levy a Tax

Opposing counsel have improperly intruded the question as to the power of the District Court to levy a tax. There is no prayer in the Complaint that a tax be levied (R. 2). In the Decree there is an express finding that the Jefferson Circuit Court, the court in which the District was created, had already levied a tax (R. 9). A copy of the Order of the Jefferson Circuit Court levying the tax is made an exhibit to the Response (R. 26). The District Court has made a finding that it has never been called upon to levy a tax. (Finding of Fact "P", R. 45.) Any question concerning the power of a federal court of equity to levy a tax is definitely out of this case.

Res Adjudicata

The Decree of the District Court was entered December 22, 1936 (R. 11). There is no question concerning the court's general jurisdiction. The suit was between citizens of different states, and the amount in controversy was in excess of $3,000.00, exclusive of interest and costs. The suit was docketed on the equity side and the court proceeded to a decree granting the relief as prayed for in the Complaint. Neither in the District Court nor in the appellant court was any jurisdictional question raised. A void judgment, of course, cannot be a basis for *res adjudicata*, but a judgment finding that the court has jurisdiction is not a void judgment. Here, inherent in the granting of relief was the finding that a court of equity had jurisdiction. A judgment on that point is conclusive: See:

Des Moines Navigation & Railroad Co. v. *Iowa Homestead Company,* 123 U. S. 552;

Chicot County Drainage District v. *Baxter State Bank,* 308 U. S. 371.

A motion to terminate a supervisory proceeding for cause is something quite different from a motion to dismiss for lack of jurisdiction. To terminate for cause is a continuing power. The question of jurisdiction is settled by the original Decree. See:

Western Union Telegraph Co. v. *International Brotherhood of Electrical Workers,* (C.C.A. 7) 133 F. (2d) 955.

To ask for relinquishment of supervision for cause is permissible, but to ask that after the lapse of seven years that a proceeding be dismissed because the original decree was not within the court's jurisdiction constitutes a collateral attack on that decree.

It is elementary law that a judgment or decree is *res adjudicata* not only as to all defenses presented, but also as to all which might have been presented. See:

Commercial Electric Supply Co. v. *Curtis,* (C.C.A. 8) 288 F. 657.

Church v. *Gallic,* 76 Ark. 423, 88 S. W. 979.

Is Was Proper to Proceed in Equity

The Act provides that the Commissioners may, by "mandatory injunction in equity" be complelled to perform their duties. The Supreme Court of Arkansas has twice construed Act 79 of 1933 which is identical to Act

46 except that it applies to municipal improvement districts. See *Dickinson* v. *Mingea*, 191 Ark. 946, 94 S. W. (2d) 803, and *Rogers Paving Improvement District No. 3* v. *Swofford*, 193 Ark. 260, 99 S. W. (2d) 577. The prayer of the Complaint was for supervision in accordance with the interpretation announced in the Mingea case (R. 3). In that case the Arkansas court had said:

> "The chancery courts have not been deprived of their jurisdiction in regard to improvement districts, and neither act 46 nor act 79 manifests any such intention. The provisions of these acts, even to their preamble, are identical except as to the designation of the kinds of improvement districts to which they respectfully relate" (p. 951).
>
> * * * * * *
>
> "The verb 'made' as here employed means to require or compel. But how are the commissioners to be 'made' to discharge their duties? Section 1, above quoted, answers 'by mandamus or by a mandatory injunction in equity.' There is therefore no abridgement of the court's jurisdiction. The commissioners become receivers in effect in that they become subject to the jurisdiction of the court. The commissioners would thereafter report to and be supervised by the court just as a receiver would be to the end that they were 'made' to discharge the duties imposed upon them by law. The receivers could do no more than to follow and be governed by the law" (p. 952).

Prior to the rendition of the decision in the case of *Street Grading District* v. *Hagadorn*, (C.C.A. 8) 186 F. 451, there was no Arkansas statute providing for the appointment of a receiver for a municipal improvement district in the event of default in the payment of bonds. That decision was rendered in 1911. Subsequently the statute was enacted which provided for the appointment of re-

ceivers for municipal improvement districts in the event of default. The jurisdiction of equity with respect to such receiverships was the jurisdiction to which the court referred in the above language quoted from the opinion in the *Mingea* case. The 1933 acts put an end to fee paying receiverships in all types of improvement districts. To avoid invalidation under the Federal Constitution, it was necessary that adequate substitute remedies be provided. The equitable remedy provided by Act 46 of 1933 was the substitute for the equitable remedy theretofore existing.

This Court has held that a Federal court of equity may dispense the receivership remedy which is provided by State statute. See *Guardian Savings & Trust Co.* v. *Road Improvement District No. 7*, 267 U. S. 1. The remedy provided by Act 46 of 1933, according to the interpretation given by the Supreme Court of Arkansas, is substantially the same remedy which in the above case was held to be within the competence of a federal court of equity.

In an effort to distinguish, opposing counsel say that the district which issued the bonds involved in *Guardian Savings & Trust Co.* v. *Road Improvement District, supra,* was "atypical". That statement is erroneous. The Arkansas statute which was before this Court in that case was the autotype of all Arkansas statutes general and special, providing for the creation of improvement districts and the issuance of bonds.

The statute under which municipal improvement districts are formed contained such a provision. See *Dickinson* v. *Mingea, supra,* for a reference to Act 64 of 1929. The general statute providing for the creation of road improvement districts in Arkansas, (now repealed) enacted

in 1915, contained such a provision. See Kirby & Castle's Digest of the Statutes of Arkansas, Section 9152. The general act for the creation of drainage districts in Arkansas, enacted in 1909, the act under which Kersh Lake Drainage District was formed, contained such a provision. See Kirby & Castle's Digest of the Statutes of Arkansas, Section 5864. We know of no improvement district statute which authorizes the issuance of bonds which does not contain such a provision. No bonds could be issued in the absence of such a provision. Experience had taught investors that the remedy by mandamus was worthless, and that with no other remedy their bonds would be worthless. All of the foregoing statutory provisions for remedies by ordinary receiverships were repealed by the two Acts of 1933.

In speaking of the case of *Mercantile Commerce Bank & Trust Co.* v. *Drainage District*, 69 F. (2d) 138, counsel say:

> "The above case was decided in February, 1934. It settled the law that the federal courts were without power to appoint receivers to collect improvement district taxes in Arkansas. That is, it settled the law until receivers were appointed in the present case on December 22, 1936."

The receivership there sought was of the type provided for by Section 5864 of Kirby & Castle's Digest. It was denied because that statutory provision had been repealed by Act 46 of 1933. That case was decided prior to *Dickinson* v. *Mingea*, *supra*, which interprets the 1933 Acts as providing for a quasi receivership, with the substance of the remedy preserved, but with the fee paying attributes eliminated.

That Act 46 of 1933 provides also for a remedy by mandamus is unimportant. The very statute which was before this court in the case of *Guardian Savings & Trust Co.* v. *Road Improvement District No. 7, supra*, also contained such a provision. See Section 20, Act 322 of 1919. Supervision in equity is a virile remedy. Mandamus is a futile proceeding.

Waiver

If we assume that, technically speaking, the suit should have been docketed on the law side, that error has been waived. Counsel has cited *Lewis* v. *Cocks*, 23 Wall. 466. That was a proceeding in ejectment. It was obvious that a law case was being thrust into a court of equity. Under such circumstances a court of equity will dismiss *sua sponte*. On the other hand no equity court will dismiss *sua sponte* a suit which is not obviously of a legal nature. The District, acting through its Commissioners, cheerfully acquiesced in the supervision by the District Court for a period of six years. Then by decrees of the State court they were cornered and made to realize that the day was not far distant when they would have to pay the taxes which had legally been assessed against their lands. At that point they found supervision to be "inconvenient" (R. 34 par. XX) and allowed their individual attorneys to use the name of the District in seeking for them an individual advantage. A court of equity will not tolerate an about face for strategic purposes. See *Brown* v. *Lake Superior Iron Co.*, 134 U. S. 530. Only when it is obvious that the suit is completely out of place in a court of equity will there be entered *sua sponte* an order of dismissal. In all other a waiver will be exacted if there is delay in making objection. See *Pennsylvania* v. *Williams*, 294 U. S. 176; *Singer Sewing Machine Co.* v. *Benedict*, 229 U. S.

481; *Matthews* v. *Rogers*, 284 U. S. 521; *Atlas Insurance Co.* v. *Southern Inc.* (footnote), 306 U. S. 563, and *Audit Company of New York* v. *City of Louisville*, (C.C.A. 6) 185 F. 349:

In *Twist* v. *Prairie Oil Co.*, 274 U. S. 684, it is pointed out that even in cases which seem to be preponderantly of a legal nature, equity courts had retained jurisdiction where there were "special facts" or on account of the kind of "relief sought" or because the defendant had "waived" the objection. We quote from the opinion:

> " * * There are cases in the federal courts in which suits in equity to quiet title brought by one out of possession against one in possession have been entertained, because of the special facts, or because of the particular relief sought, or because the defendant waived the objection of lack of equity jurisdiction. *Simmons Creek Coal Co.* v. *Doran*, 142 U. S. 417; *Schroeder* v. *Young*, 161 U. S. 151; *Duignan* v. *United States*, *ante*, p. 195; *Jones* v. *Prairie Oil & Gas Co.*, 173 U. S. 195; *Kilgore* v. *Norman*, 119 Fed. 1006 aff'd 120 Fed. 1020; *Big Six Co.* v. *Mitchell*, 138 Fed. 279; *Continental Trust Co.* v. *Tallassee, etc. Co.*, 222 Fed. 694, 702. Such waiver is possible, because the objection that the bill does not make a case within the equity jurisdiction of a federal court goes not to the power of the court as a federal court, but to the merits" (p. 691).

The element of "obviousness" is missing here but the "special facts" are present. The statute under consideration was substituted for one which gave an equitable remedy. It specifically provides for the use of "a mandatory injunction in equity". The Arkansas court has interpreted the statute as providing the equivalent of an equitable receivership. The District Court has concluded

that a Federal court of equity may grant relief in accordance with Act 46 of 1933 (R. 46). The Circuit Court of Appeals has affirmed. Only with the turn of events which necessitated desperate measures did the Commissioners find technical grounds for objecting to the jurisdiction. When they were before the Supreme Court of Arkansas on the first appeal, they conceded that Federal Court supervision was proper. We quote from the opinion in the case of *Johnson* v. *Kersh Lake Drainage District*, 198 Ark. 743, 131 S. W. (2d) 620:

> "As we view it, the power of the Federal court to make the mandatory order which it made is unquestioned.
>
> "In the present case appellants are not resisting the order of the Federal court directing the District to assess and collect a tax. *They concede the validity of that order* and the duty of the District and its officers to obey it" (Emphasis supplied).

If the petitioners ever had any right to object it has clearly been waived.

Conclusion

Every order made in this proceeding, with the exception of those which required the Commissioners to apply for a writ of certiorari and to allow the attorneys for the creditors to associate with the District's regularly employed attorney in the foreclosure suit, was entered at the request of or with the consent of the District. See Findings "F", "G", "H", "L" and "N" (R. 42 and 44). It is idle to speak of the illegality of certain orders which were entered by consent of those who now complain. If in the future any order is entered which is in excess of the court's authority then the District can appeal.

Having read the opinion filed in the Circuit Court of Appeals, counsel filed a Petition for Rehearing (R. 59-60). Apparently they shifted from the position of "no jurisdiction" to that of jurisdiction with limitation as to the type of orders to be entered. In realty they have no complaint with any order entered by the District Court except those which apply moderate compulsion to the Commissioners and require them to do what every honest official would voluntarily do. They tried hard to persuade the Circuit Court of Appeals to modify its opinion by pronouncing those particular orders to be improper. The petition was overruled, and now counsel shift again and resume their original position.

Counsel say that a "splendid piece of constructive legislation in the interest of public economy * * * is being circumvented if not completely nullified by the invention of *deemed* receiverships and by expanding the mandatory injunctional process to cover the whole field of an ordinary receivership."

That is merely their criticism of the construction which the Supreme Court of Arkansas has given the Act. No Federal court is going to heedlessly expand the scope of the remedy beyond the limits fixed by the court which is entitled to speak with authority as to its meaning.

The question now presented is not one which justifies consideration by this Court.

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